JURISDICTION OVER FOREIGN CORPORATIONS AND INDIVIDUALS WHO CARRY ON BUSINESS WITHIN THE TERRITORY

PROBABLY the most pressing of the tasks now confronting American students of Conflict of Laws is the delimiting of the jurisdiction of the courts over foreign corporations and non-resident individuals who carry on business within a state. It is common knowledge that a few of the states by their extremely liberal corporation laws have secured a practical monopoly of the profitable business of incorporating commercial enterprises the bulk of whose business is transacted in other states. But of more importance is the fact that the entrepreneurs, the investing public and financial resources of the nation, are all concentrated in a few localities remote from the states which constitute the exploited sections of the country. Consequently it has become vital that the states, without violating constitutional guaranties, discover methods of securing justice to their citizens at home in their dealings with foreign trading groups and individuals.

Jurisdiction over foreign corporations may appear to the casual observer to involve a generically different question from jurisdiction over non-resident individuals. But a moment's reflection will make clear that for practical purposes they are merely different phases of the less obvious but fundamentally more important problem of jurisdiction over foreign groups engaged in business within a state. The volume of business transacted by single non-residents through occasional visits or by correspondence is too small to create any social exigency. Our task is a by-product of the activities of great commercial aggregations controlled by non-resident individuals and groups corporate or unincorporate. This article will, therefore, primarily represent an investigation of methods of securing jurisdiction over such organizations.

The jurisdiction conferred upon any particular court is today a matter of statute and simply a question of delegation of authority. It may be settled by a glance at the statute books and annotating

authorities. What is important, therefore, is not to determine what jurisdiction the courts have been given, but what jurisdiction they can be given under accepted principles of Conflict of Laws and subject to the limitations of the Constitution. The discussion, however, of any moot question of jurisdiction must of necessity be prefaced by a restatement of certain fundamental principles axiomatic in Conflict of Laws which will be controlling of any conclusions proposed.

Jurisdiction, in the international sense, rests on the power of a sovereign to command and control persons and things. It does not arise from the consent of the governed; consent is only required for jurisdiction when the person consenting is not one of the governed. A sovereign is universally recognized to have the power to command a subject wherever he is; hence we have jurisdiction by allegiance. A sovereign is recognized by Common Law countries to have the power to command, despite his temporary absence, one who has established a domicile within its borders, giving it jurisdiction by domicile. The best-recognized and oldest form of jurisdiction is that obtained by the presence of the individual. This is the only form of jurisdiction exercised over property.

The sovereign has jurisdiction of the persons and property within its territory altogether irrespective of the consent of those persons, or the owners of the property. They may be rebels denying the authority of the government or even anarchists. But so long as a government is recognized to be *de jure* by other nations, their governments acknowledge its right to exercise sovereignty over all persons and things rightfully within its borders, and recognize abroad the legality of this exercise. We say rightfully, because it is evident that any extension of jurisdiction[1] by a method not recognized internationally as proper, could not be countenanced by other nations. It is particularly desirable to keep in mind that consent has nothing to do with the application of the laws of a sovereign to one who enters its territory. No government makes it a condition of admission into its territory that each person entering agree in fact to be governed by its laws. Certainly very few travelers are conscious parties to any such social contract. Indeed, every government is aware that a great many cross its borders with the

[1] E. g., bringing persons or property within the existing boundaries of a sovereign by kidnapping, robbery, etc.

intention of being governed as little by its laws as they can manage. Yet entrance with such an intention alone has never been made a crime. As a matter of fact, their entrance into a territory cannot be said to constitute consent to be governed by the laws of that territory or even evidence it, because consent is neither asked nor necessary to the application of those laws.

The courts are generally entrusted with all the judicial jurisdiction actually exercised by their sovereign, only to be assumed, however, when invoked by suitors in the ways provided by the procedural law. This jurisdiction is over persons and things. When the former, it is said to be *in personam;* when the latter, *in rem.* When jurisdiction is exercised over property to give damages to the plaintiff without jurisdiction of the person of the defendant, it is said to be *quasi-in rem.* As the principles upon which jurisdiction *in rem* and *quasi-in rem* depend are simple and well settled, our attention may be confined to jurisdiction *in personam.*

In order to impose a personal obligation by means of a judicial proceeding, the court must get jurisdiction in one of four ways: (1) by presence, (2) by domicile, (3) by allegiance, (4) by consent. It is conceived that a court may obtain jurisdiction of a foreign corporation in two of these ways: by its consent or by its presence. The foreign corporation, assuming it to be a single group chartered by a single foreign state, is domiciled in and owes allegiance only to that state.

A brief survey of the history and legal theories of group personality affords the best avenue of approach to our subject. The mature development of the law of corporate association then suggests the advantage of treating next jurisdiction over foreign corporations. As space does not permit a discussion of the extent of state control of foreign corporations engaged in interstate commerce, the only constitutional questions raised in this division of the article will be those depending on principles of Conflict of Laws. The last division of the article covering jurisdiction of foreign unincorporated groups and individuals involves a study of the comity clause of the Constitution. It may be profitably subdivided into (*a*) scope of the comity clause, (*b*) jurisdiction over foreign unincorporated groups, and (*c*) jurisdiction over non-resident individuals.

I

In the early law, the group of kindred living together constituted the legal unit. It was responsible for the delicts of its members, and all obligations were owed to it. It came to be represented by *paterfamilias*, who alone had legal personality, that is, was the subject of rights and duties. He owned the property of the group, he was liable for the delicts of its members, and he was entitled to their acquisitions.[2] But as Sir Henry Maine pointed out, the progress of law has, until recently, been from status to contract, that is, from the legal recognition of but a single member of the group, with the rest *in potestas*, to the recognition of each member as the subject of rights and duties equal with the first save in so far as natural incapacity prevents. Hence today we say that the individual is the natural legal unit.

But dealing with man as an individual does not exhaust his jural significance. His activities and interests are not merely individual; they are also collective. His home life is bound up with the family; his economic life is bound up with his business associates. He seeks to secure his religious interests in the church, and his more important communal interests in the state and its various subdivisions. Passing from the individual to the group, we find its members working as a unit to secure group ends. Ordinarily, while engaged in group pursuits, a man's individual ends are for the moment submerged — his activity is merely a phase of the group activity directed towards effecting the group purpose. An excellent example of this is an army in action. The individual's interest in protecting himself on the one hand, and in self-glorification on the other, is absolutely subordinated to the group purpose, the destruction of the enemy. Further, there is a group consciousness and a group will with which the individual consciousness and individual will are assimilated. It is elementary that men act in groups in a way that would be incomprehensible in most of the members of the group taken individually. Mob psychology attempts to deal with some of these phenomena. Corporation and national morality are notoriously lower than individual morality.

The group directs its activities in ways precisely analogous to those adopted by the individual. It contracts as an entity, it com-

[2] MAINE, ANCIENT LAW, Ch. V — *Patri Potestas*.

mits delicts, it holds group possessions, and acts generally as a unit. Indeed the superiority of group over individual action is due to the fact that the group can apply the method of the individual with many times his force. Hence it would appear that the group is as capable of supporting legal personality as the individual, while the protection of group interests seems to require group rights to nearly the same degree that individual interests require individual rights. But what is more important, the protection of society makes it imperative that the group be subject, as such, to duties, and duties distinct from those imposed on its component members, because the group is often infinitely more formidable than the sum of its members.

The law has recognized this social aspect of man's life and his group interests in various ways. Family interests are protected through the laws relating to the disposal of the property of husband and wife, through community property laws, family exemption laws, through death statutes, and through the actions allowed for alienation of affections and seduction. Because, however, of the small size of the group it has been possible adequately to secure these interests by conferring individual rights upon the members of the family against one another and against the whole world, and imposing the correlative obligations. Thus the law, while not dealing with the family group directly, makes the relations of its members to the group itself and to the outside world, the bases of the rights which afford it legal protection. This has similarly been true of man in his economic relations. Where his common interests have been those of a small group or partnership, they have been treated not unlike the interests of the family. While the law recognizes the community of interest and of activity, nevertheless it has, until recently, secured them entirely through the individual. But it should be remembered that this method is not a necessary one, and that it persists only because of legal convenience and legislative inertia. The partnership has always been treated as a unit in the mercantile world. As conditions require, it is daily coming to be treated more like a unit in the legal world.[3]

For a long time the only groups with which the state directly concerned itself were those which exercised such a degree of social con-

[3] Uniform Partnership Act; Bankruptcy Act; Statutes making large partnerships suable in firm name to be discussed *infra*.

trol as to be the state's competitors. Such groups were so large that it was obviously impracticable to deal with them through their individual members. That was too cumbersome a way to secure the interests of the group, and an almost impossible way of securing the interests of society in the control and regulation of the group. When the mediæval courts declared it a usurpation against the king to set up a corporation without his charter, they had no reference to our ordinary trading corporations, and were not thinking of the privilege of limited liability. What the courts were striking at was the founding of municipal corporations and guilds, which, if not well under the royal control, might threaten the very monarchy itself. The royal apprehension will be readily understood if one but recalls the power of the City of London in the great feudal wars, and the exploits of the butchers' guilds of Paris when they made the rulers of France, and held the mighty Burgundy at their beck and call. The guilds and municipal corporations exercised a control over their journeymen and burghers, respectively, covering the most important phases of their economic and communal life, and existed for the sole purpose of furthering their interests. In turbulent days, such organizations could only be tolerated as the vassals of the king, exercising their governmental authority by virtue of his charter. This is the secret of the kings' jealousy, and control of the corporate franchise, since nearly all early corporations which were not religious were governmental. In the later Tudor periods, when the government had become more firmly settled, the great trading corporations became more common. But these were also governmental in their nature, and in time acquired and governed great territories for the Crown of England under its charters.[4] Gradually, however, the governmental feature became less significant, and corporations became popular because of their facilities for obtaining capital from the investing public and the limited liability involved. The state, nevertheless, retained control of the corporate franchise, not now as a measure to insure its own safety, but in order to protect the public from the ruinous stock speculations which finally led to the Bubble Act. In this way we have our modern corporation coexisting with the trading copartnership, and differing from it as a practical matter only in the possession of certain legal privileges.

[4] British East India, London, and Plymouth Companies.

The private corporation has become completely distinguished from the public corporation.

Thus, up to the middle of the nineteenth century, the law of corporations furnished but meager jural material for the regulation of our varied forms of group activity. As a matter of fact there were relatively very few private corporations, and until well into the last century practically all of the cases dealt with public corporations. After Tudor times, however, the English state, although still retaining a close grasp on the corporate franchise, did not display its earlier jealousy of association. Standing armies had made single groups of artisans or untrained burghers comparatively innocuous. Hence we find developing contemporaneously with the private corporation all sorts of unincorporated associations ranging from the closely knit church organizations, Catholic and Non-Conformist, to the loose underwriting groups of the Lloyd's type; — from the great friendly societies to the select social clubs, each securing adequate legal protection behind its hedge of trustees.[5] That absolutely unique of English legal institutions, the adaptable trust cleverly shaped by centuries of the subtlety of the English Bar, secured practically all the advantages of corporate organization without any of its drawbacks. The citadel of corporate association, made impregnable to a frontal attack by the imposing maxims of Crown lawyers, was furnished with an easy approach from behind. Nevertheless the personality of these groups as such was not recognized by the courts, and hence we have the complete separation of legal from natural personality in the law of group activity.[6]

But coming into the nineteenth century, the state again faced the problem of dealing with combinations of men which threatened to shake its very foundations. The discontent of the great proletarian masses under the new industrial régime made the struggles of small groups of burghers and journeymen seem but teapot tempests. Little consideration was given to the interests of the group; the legislature only thought to secure the state. At first it sought

[5] 3 MAITLAND, COLLECTED PAPERS, 321 (Trust and Corporation); Introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE.

[6] Williston, History of Law of Business Corporations, 3 SELECT ESSAYS ANGLO-AMERICAN LEGAL HISTORY 195; Carr, Early Forms of Corporateness, 3 SELECT ESSAYS 161; 2 HOLDSWORTH, HISTORY OF ENGLISH LAW, 362; 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 486; 3 MAITLAND, COLLECTED PAPERS, 271 *et seq.*

to solve the problem through repression, by making associations for certain purposes illegal. This expedient by the very nature of the case was soon found to be a social impossibility and more conciliatory methods were gradually adopted. It is not our intention to go into the history and development of the combination laws here.[7] But it will suffice to say that the present English solution is to permit the utmost liberty of association under the maximum of feasible government supervision. What is feasible is frequently for a number of reasons very limited. Today the English law confers corporate personality upon registration on any group complying with a few formalities,[8] and requires registration where the group consists of more than twenty persons and is organized for profit.[9]

The French and German laws as to association have had a similar history except that the German law was more profoundly affected than the French by the concession theory of Innocent IV.[10] In mediæval times, the continental states reserved to themselves the prerogative of licensing associations for reasons similar to those obtaining in England. All associations without a license were illicit. But in France when we reach the mercantile period, the Government has become firmly established by Richelieu. The law is no longer so jealous of associations in general, and groups organized for mutual gain without a license are not considered illegal, but they are, so to speak, extra-legal and hence not recognized as possessing legal personality. It was natural to attribute the juristic personality of the licensed associations to the license.[11] Thus, by the time of the Code Napoléon in 1804, we have a complete separation of the concept of personality from the right of association. The Code took much the same attitude towards associations as that adopted in England. But, as in England, the French law throughout the nineteenth century was marked by a growth of liberality towards associations in general, and a constant broadening of juristic personality. This culminated in the French Law of Associations of

[7] Reference for that may be made to Professor Dicey's article in 17 HARV. L. REV. 511. See also Geldart, "Status of Trade Unions in England," 25 HARV. L. REV. 579.

[8] Companies Act of 1862, Consolidation Act of 1908, 5 HALSBURY, LAWS OF ENGLAND, §§ 58, 59; Quasi-Corporations, 5 HALSBURY, LAWS OF ENGLAND, § 1352; Trades Unions Act of 1913, 27 HALSBURY, LAWS OF ENGLAND, §§ 1164 *et seq.*, 1168.

[9] *Ibid.*, 5 HALSBURY, LAWS OF ENGLAND, §§ 55, 56.

[10] See *infra*, p. 684.

[11] Of course this was correct in a sense, but the more proximate cause was the fact of legal recognition.

1901, in which liberty of association is secured, and juristic personality is conferred on all associations legally constituted.[12] The German Code, likewise, allows full freedom of association, and confers juristic personality on any group complying with a few formalities.[13] Today, we may say that the Continental Law makes no distinction between the individual and the group as to personality. It is obtained by each on registration.

The so-called concession theory, that the personality of a corporation is a pure fiction created by the state, and not merely a natural fact given legal recognition, is being discarded throughout the world, first in fact, now in theory. The general corporation laws and the *de facto* doctrine in this country, the English Companies' and Trades Unions' Acts, the French Associations Law of 1901, and the German Code indicate what has happened in fact. Sir Frederick Pollock tells us the English Common Law never adopted the theory.[14] In the face of our doctrines as to *de facto* corporations, and corporations incorporated in two states, we can hardly claim that our courts ever did more than lip service to it. It is significant that the English Interpretation Act of 1899, section 19, provides that the word "person" shall be taken to include any body of persons, corporate or unincorporate, unless the contrary intent appear. Similar statutes are not uncommon in this country.

In order, however, to deal with the problems of jurisdiction over foreign corporations or groups, we must examine the relations of the group and its members to the community outside of the group. The corporate group affords the most profitable field for observation, but our conclusions will be applicable to all group activity. It is apparent that the individual member of any group devotes but a part of his time to the activities of that group, most members a relatively small part of their time. Outside of this time, their activity cannot be said to be in any sense the group activity, and our coming in touch with them does not put us in touch with the group. The stockholders of a corporation may perhaps attend the annual meeting — it is more likely that they will send proxies — but that

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[12] CAPITANT, DU DROIT CIVILE, 160 *et seq.*

[13] GERMAN CIVIL CODE, §§ 21, 22; SCHUSTER, PRINCIPLES OF GERMAN CIVIL LAW, 37 *et seq.*

[14] "Has the Common Law Received the Fiction Theory of Corporations?", 27 L. QUART. REV. 219.

concludes their relations with the group. At the meeting, however, they do elect directors who take a more immediate part in the group's operations, formulating its policies and in a very general way supervising its management. But even the directors devote a relatively small part of their time to the corporation's business, perhaps attending a meeting once a month. The immediate management is in the hands of a group of officers who devote all their economic activity to managing its affairs. They, with all the employees of the corporation, are the most evident part of the group, the most important, and frequently the most permanent. When one comes in contact with an officer or an employee of the corporation engaged in the corporate business within the scope of his employment, he comes in contact with the group, and the activity of such an officer is group activity. We have been accustomed to separating the corporation from its agents very sharply as a matter of law, — treating the relation between the corporation and agent as that between individual and individual, — when, as a matter of fact, the agent is a part of that natural group which is given legal personality as a corporation. Indeed the legal recognition of the personality of a group unit, or the lack of such recognition, is not material. If we take the case of a great banking firm, instead of a corporation, we find that employers and employees are both members of one group, working for the mutual advantage to accrue from the successful operations of the firm. The internal distribution of profits cannot affect the external fact apparent to the world. To make the employer the single proprietor of a great banking house does not seem to change the result any. The only difference is that now one controls, and one takes the lion's share of the profits. The internal structure of the group or the relations of its members *inter se* have little significance for the purposes of jurisdiction. But it is of the utmost importance that courts become cognizant of a fundamental fact of group organization, *viz.*, that the humblest miner in the employ of the United States Steel Company is as truly a member of that group as its president or any shareholder; that the least of the clerks employed by the firm of J. P. Morgan & Company is as certainly a member of the group associated for mutual profit under that name as J. P. Morgan himself. The civil law, not having as broad a conception of agency as our law, has been compelled to adopt the organic theory, at least in dealing with the gov-

erning boards of corporations.[15] It is questionable whether the problems of Conflict of Laws have not now forced us into a position in which we must take a more realistic view of the relations of individuals in and to their groups.

II

It was thought at Common Law that a corporation could not be sued unless service of summons was made upon its head officer.[16] Such service was conceived to be impossible in the case of a foreign corporation, because it was said that the officer dropped his official capacity as soon as he left the state of incorporation.[17] Indeed, this was the ground for setting aside an attachment of a foreign corporation's property in New York.[18] Seemingly the only difficulty felt by the courts was that of service, since none of the cases seem to doubt that once that difficulty was removed the courts had power to render a personal judgment.[19] These doctrines, however, were apparently breaking down and the weight of authority taking a more liberal view,[20] when the *dictum* of Chief Justice Taney appeared in *Bank of Augusta* v. *Earle*[21] in 1839. He tells us:

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

The source of the doctrines of the early cases and of Chief Justice Taney's theory is of course very clear. Throughout the early part of the nineteenth century the law of private corporations took its complexion entirely from the law of municipal corporations. For

[15] Maitland, Introduction to GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE, 40.

[16] 1 KYD, CORPORATIONS, 272.

[17] McQueen *v.* Middletown Mfg. Co., 16 Johns. (N. Y.) 5, 7 (1819); see also Peckham *v.* North Parish, 16 Pick. (Mass.) 274, 286 (1834).

[18] McQueen *v.* Middletown Mfg. Co., 16 Johns. (N. Y.) 5, 7 (1819).

[19] Bushel *v.* Insurance Co., 15 Serg. & R. (Pa.), 173, 176 (1827); ANGELL & AMES, CORPORATIONS (1831), ch. 10, § 12.

[20] In Libbey *v.* Hodgdon, 9 N. H. 394 (1838); March *v.* Eastern R. Co., 40 N. H. 548, 577 (1860); Day *v.* Essex County Bank, 13 Vt. 97 (1841), personal judgments were given against foreign corporations doing business within the territory without the consent of the corporation to the jurisdiction of the courts.

[21] 13 Pet. (U. S.) 519, 558.

one thing, the law of municipal corporations having been carefully worked out, furnished the most handy analogies. But more important, the law of private corporations was historically a mere outgrowth of the law of public corporations.[22] Most books prior to Angell and Ames in 1831 treat the subject of private corporations as only a small and unimportant branch of the law of municipal corporations.[23] Moreover, what is most significant, all the books on practice and pleading of the early part of the century in discussing suits against corporations consider only public corporations and cite only municipal corporation cases.[24] It is of course evident why a municipal corporation could neither migrate nor have a legal existence outside of the state, and why service must have been made on one of its head officials.

A corporation is merely a group constituting a natural unit upon which the state has conferred personality just as it has upon individuals who are also natural units. Incorporation is said to be a status. Does it follow that legal recognition is only effectual intraterritorially? Among continental countries the personality of individuals is a status. But when the individual migrates from one state to another his personality will be recognized there by doctrines of Conflict of Laws. When the corporation, another natural unit, migrates it must be given similar recognition. In Common Law countries this is certainly true of any other status, whether it be marriage or legitimacy or ownership. The status created by the sovereign with jurisdiction will be recognized elsewhere. Foreign corporations are permitted to own property within the jurisdiction, to have rights against the sovereign's subjects, sue in the domestic courts, and altogether are given the same privileges as foreign individuals. But we are told this arises merely from the fact of the recognition of the foreign status as existing where created, and the foreign corporation is not allowed to do more than any foreign individual might do with the aid of agents. Whether this is an answer or no is not quite plain. Both the foreign individual and foreign corporation are thereby granted rights within the sovereign's terri-

[22] In Sutton's case, 10 Rep. 29 b, Coke states a "place" to be one of the requirements of a corporation; Williston, History of Law of Business Corporations, 3 SELECT ESSAYS, 206.

[23] ANGELL & AMES, CORPORATIONS, Preface.

[24] 1 TIDD, PRACTICE (1803), 116; 1 CHITTY, PLEADING (1809), 368; American edition (1812), 368; 1 ARCHBOLD, PRACTICE K. B. (1834), 450.

tory and are recognized as possessing them there. This necessarily involves the recognition of the foreign status as a domestic institution for some purposes at least. Of course the powers of a foreign corporation must depend on the law of the state creating it, since that law governs its charter, which is the compact of the group delimiting its activities.

But if we are to consider the corporation as a group unit we must allow it the attributes of group unity. One of these is the capacity to be in several places at once. The Roman Catholic Church is as truly present in America as in Rome. The American Federation of Labor is in New York, Chicago, and San Francisco simultaneously. A group is wherever its members may be carrying on authorized group activities. Unless we accept this proposition we can never say a group is in any place unless all its members are there. The American Federation of Labor cannot be in the United States so long as a single organizer is at work in Canada, under this theory. But if we say it is in the United States on these facts we must also say it is in Canada. To adopt a crude physical parallel, it is in somewhat the same position as a man lying across the border line. He is in both Canada and the United States. The English courts have recognized the validity of this reasoning in a long line of cases, following Lord St. Leonard's *dictum* in *Carron Iron Co.* v. *Maclaren*,[25] that a corporation "may, for the purposes of jurisdiction, be deemed to have two domiciles . . . The places of business may, for the purposes of jurisdiction, properly be deemed the domicile." It is evident that the noble lord meant only to say that the corporation doing business in both England and Scotland was present and amenable to process in both. Blackburn quotes him with approval in the leading English case on the subject, *Newby* v. *Van Oppen*.[26] In that case a New York corporation doing business in England was held to be subject to the jurisdiction of the English courts and servable with process in the ordinary way. The case and Blackburn's opinion have since been put beyond doubt by the decision of the House of Lords in *La Compagnie Transatlantique* v. *Law*,[27] where the Lord Chancellor placed the decision of the case on the ground that the corporations

[25] 5 H. L. Cas. 416, 449 (1855).
[26] 7 Q. B. 293 (1872).
[27] [1899] A. C. 431, 433.

"are here and if they are here they may be served." [28] In *Logan* v. *Bank*, the Court of Appeal said:

"If a foreigner is found within the jurisdiction, he may be served with a writ, although the cause of action did not arise in England; and it is not easy to see why there should be a difference as to the right to serve a foreign corporation which is found to have a place of business, and to be trading in this country, and which is therefore to be treated as resident here."

Neither Dicey nor Westlake seems to find anything unnatural or strange in this English conception of corporate presence.[29]

All American authority reaches the same result. But it has been thought that the American cases can be explained on the ground of a previous consent by the corporation to submit to the jurisdiction of the court. It may be said that the corporation has agreed with the state to submit to the jurisdiction of its courts, or that the corporation has agreed with the individual plaintiff to submit any difficulties arising out of their transactions to the jurisdiction of the domestic courts, or both. Contract claimants might very well claim that they had a right to expect that the corporation had complied with the laws of the state as to doing business there, and that submission to the jurisdiction of the domestic courts was an implied term of their bargain. This reasoning, however, would exclude all other types of claimants, and there is no evidence that the courts discriminate against tort suitors.

The basis of the consent theory is found in the power of the state to exclude absolutely corporations not engaged in interstate commerce.[30] If the state may exclude the corporation altogether, it may admit it to do business within the state on the condition that it consent to the jurisdiction of the state's courts, making business done on any other terms illegal. It may make such an offer to the corporation which the latter can accept. Coming in to the state and doing business there might be said to constitute an acceptance, the reasonable impression of the state being that the corporation was acting legally and accepting its offer. There are two very ob-

[28] Haggin *v.* Comptoir D'Escompte De Paris, 23 Q. B. D. 519 (1899 C. A.); L'Honeux *v.* Bank, 33 Ch. D. 446 (1886); Dunlop *v.* Actiengesellschaft, [1902] 1 K. B. 342; Logan *v.* Bank, [1904] 2 K. B. 495, 499.

[29] DICEY, CONFLICT OF LAWS, 2 ed., 160–163; WESTLAKE, PRIVATE INTERNATIONAL LAW, 5 ed., 395.

[30] Paul *v.* Virginia, 8 Wall. (U. S.) 168 (1868).

vious difficulties. The corporation might set up that it was never acquainted with the offer and hence could not have accepted it. This line of defense has never been tried. Every one is perfectly well aware that it would be futile. Nevertheless the proffer of such a defense tests the consent theory. The courts would answer that everyone is presumed to know the law. The consent we speak of, is not a consent to any particular law but a consent to all the laws of the jurisdiction. By coming into a jurisdiction one consents to be bound by its laws. But nobody would contend that an individual entering a state consents in fact to be bound by its murder laws. Certainly no would-be murderer makes such an agreement. He is bound by them all unwillingly, because he acts within the state. A more fundamental difficulty is, however, that the state ordinarily gives not the slightest evidence of a bargaining mind.

The statutory provisions appear to be of three kinds. The most common type adopted by nearly all the important jurisdictions forbids the doing of business in the state before the filing of a written consent to the jurisdiction of the state courts. The statute also usually requires the designation of one or more persons on whom process may be served.[31] A few jurisdictions expressly permit service upon any agents of the corporation who are doing its business in the state,[32] while some of the jurisdictions cited *supra* allow service not only upon the designated agent but upon all others.[33] Others provide that service on a foreign corporation may be made in the same manner as upon a domestic corporation.[34] A few seem to have made no special provision at all.[35] But in these states a foreign corporation appears to be servable in the way provided for domestic corporations.[36]

In states having statutes of the first type there is no ground what-

[31] Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana. Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington, Wisconsin, Wyoming.

[32] Delaware, District of Columbia, Texas.

[33] Idaho, Michigan, Minnesota, Missouri, New Mexico, Pennsylvania, South Carolina.

[34] Florida, Maine, Louisiana, Maryland, Massachusetts and Tennessee.

[35] Georgia, New Hampshire and West Virginia.

[36] Fire Insurance Co. *v.* Carrugi, 41 Ga. 660 (1871); Hayden *v.* Androscoggin Mills, 1 Fed. 93 (1879); Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65 (1870).

ever for supposing that the corporation has agreed to the condition imposed by the state, unless the corporation accepts in the manner indicated by the offer. Yet it is perfectly clear law that where the corporation does business within the state without filing the required consent, service made upon its agents will sustain a judgment against it.[37] The only ground on which these cases may be supported is that the corporation is present in the state. But the cases go further. The consent of the corporation to the jurisdiction of the courts cannot be said to be any broader than that required by the statute. Yet in *Steamship Co.* v. *Kane*,[38] the United States Supreme Court held that service on an agent was sufficient to give the Federal Court jurisdiction in a suit brought by a non-resident although the New York statute only provided for suits by residents. The court put its decision on the broad ground that the foreign corporation was present within the jurisdiction.[39] Even where the statute requires the designation of a state officer to accept service and the designation is not filed, judgments rendered upon service on that officer are sustained, and rightly so.[40] The corporation while doing business in the state is within its jurisdiction and the question of service alone is raised. Service on the state officer in charge of any particular type of foreign corporations on whom the duty is imposed to notify the defendant, is not an unreasonable method of service.[41] But it has been suggested that the statutes in question might be construed to include two things: the imposition of a condition that the foreign corporation, if it comes into the state to do business shall consent to be sued, and a provision as to the method of suit. From

[37] Mining Company *v.* Johnson, 173 U. S. 221 (1898); Ins. Co. *v.* McDonough, 204 U. S. 8 (1906); Harvester Co. *v.* Kentucky, 234 U. S. 579 (1913), cited *infra;* Modern Woodmen of America *v.* Noyes, 158 Ind. 503, 64 N. E. 21 (1902); Funk *v.* Ins. Co., 27 Fed. 336 (1886); Thomas *v.* Placerville Co., 65 Cal. 600, 4 Pac. 641 (1884); St. Louis Ry. Co. *v.* DeFord, 38 Kan. 299, 16 Pac. 442 (1888); Hagerman *v.* Slate Co., 97 Pa. 534 (1881).

[38] 170 U. S. 100 (1897).

[39] See also Colorado Iron Works *v.* Mining Co., 15 Colo. 499, 25 Pac. 325 (1890).

[40] Sparks *v.* National Masonic Association, 100 Ia. 458, 69 N. W. 678 (1896); Surety Co. *v.* Slinker, 42 Okla. 811, 143 Pac. 41 (1914); Ehrman *v.* Ins. Co., 1 Fed. 471 (1880); Diamond Plate Glass Co. *v.* Insurance Co., 55 Fed. 27 (1892); Mason's, etc. Ass'n *v.* Riley, 60 Ark. 578, 31 S. W. 148 (1895); but see *contra* Rothrock *v.* Insurance Co., 161 Mass. 423, 37 N. E. 206 (1894).

[41] Where no duty is imposed upon the state officers to notify the corporation, of course the statute violates the requirement of due process. Southern Ry. Co. *v.* Simon, 184 Fed. 959 (1910), aff'd 236 U. S. 115 (1914).

a glance at the statutes it seems obvious that this is a most artificial construction adopted solely for the purpose of reconciling the cases with the consent theory, although it is generally recognized that the statutes must be strictly construed.[42] But even if such a construction were to be adopted, the doing of business by the corporation within the state would give rise to no presumption of consent. In the other cases, consent might be inferred because it would be unreasonable to assume that the corporation was acting illegally when its conduct was equally capable of a legal interpretation. But in this case the corporation is acting illegally, from any viewpoint, by failing to designate an agent to receive process.

Under the second and third types of statutes, which do not require an express consent, it is not so difficult to work out an implied consent. But even here it can only be done by totally disregarding the actual language of the statutes. The statutes do not say: "We forbid you to do business within the state unless you consent to the jurisdiction of our courts." The statutes assume for the most part that the corporation is present, and that it is only necessary to provide for the method of service. This seems also to be the attitude of the states which have made no provision for jurisdiction over foreign corporations. They are served whenever an agent can be found within the state on corporate business.[43] However, since only the legislature has the power to offer terms to foreign corporations, no ground at all is afforded for presuming the consent of the corporation to the jurisdiction of the courts in these states.

Moreover, the courts, except in the very earliest cases, see no necessity for consent. The course of decision of the United States Supreme Court is typical. It is particularly instructive as it controls to a great extent the decision of state tribunals since the question of jurisdiction is usually raised on the Fourteenth Amendment. In *Insurance Co.* v. *French*, decided in 1855,[44] the opinion of Mr. Justice Curtis is based wholly on the consent theory. But in *St. Clair* v. *Cox*,[45] Mr. Justice Field makes the consent theory only one of his

[42] BEALE, FOREIGN CORPORATIONS, § 269.

[43] Railroad *v.* Harris, 12 Wall. (U. S.) 65 (1870). In Hayden *v.* Androscoggin Mills, 1 Fed. 93 (1879), service on a foreign corporation doing business in Massachusetts, where there was no statute, was sustained. See also Fire Insurance Co. *v.* Carrugi, 41 Ga. 660, 670 (1871).

[44] 18 How. 404.

[45] 106 U. S. 350 (1882).

ratio decidendi; the other he makes the presence of the corporation. *In re Hohorst*[46] makes no mention of the consent theory, while *Steamship Co.* v. *Kane*,[47] going altogether on the theory of the corporation's presence, is irreconcilable with the consent theory.[48] The real character of the consent theory is shown in *Insurance Co.* v. *McDonough*,[49] which purports to be decided on that theory. The Insurance Company made a contract in Indiana, while it was doing business within Pennsylvania, without complying with the Pennsylvania statute requiring foreign insurance companies to designate the Commissioner of Insurance as agent to receive service of process. The plaintiff subsequently attempted to bring suit in Pennsylvania on this Indiana contract by serving the Commissioner of Insurance. On the argument counsel made the point that there was no evidence that the Company was doing business in Pennsylvania when the suit was brought, and hence under the authorities the Pennsylvania court was without jurisdiction. The court so decided, but Mr. Justice Harlan, one of the older judges, who wrote the opinion, rested the decision on less tenable reasoning. He said that, while service on the commissioner could bind the corporation as to business transacted within the state, it could not as to transactions entered into without its borders, as the corporation could not be presumed to consent to service in such cases. But it must be perfectly clear that, if the insurance company is to accept the condition of the state, it must accept it as a whole, as the state has not split its offer. In this case, however, we have the additional difficulty that the corporation did not accept the offer of the state at all, because it made no attempt to comply with its terms, and hence there was no ground to presume a real consent to the condition.

This was pointed out in *Bagdon* v. *Reading Co.*,[50] where the New York Court of Appeals sustained a judgment in an action on a foreign tort, service having been made upon the agent designated by the foreign corporation to receive it. The court adopted the distinction previously taken in *Smolik* v. *Reading Co.*,[51] between actual consent and consent implied in law. Of course the latter form of consent is purely fictional and will not support jurisdiction. Jurisdiction under such a statute must exist apart from the implied con-

[46] 150 U. S. 653 (1893).
[47] 170 U. S. 100 (1897).
[48] See *supra*, p. 691.
[49] 204 U. S. 8 (1906).
[50] 217 N. Y. 432, 111 N. E. 1075 (1916).
[51] 222 Fed. 148 (1915).

sent and in the case of a foreign corporation can rest only upon its presence. In *Simon* v. *Southern Ry.*,[52] although the judgment was clearly invalid and the statute in question unconstitutional for other reasons, the court treated the case as identical with *Insurance Co.* v. *McDonough*, and took occasion to lay down the flat rule that a statute authorizing service upon a state officer where the cause of action accrues out of business transacted outside the state is *pro tanto* unconstitutional. The decision leaves the question open where there is actual consent. As it does not purport to overrule *Steamship Co.* v. *Kane*,[53] a foreign corporation not having consented to the jurisdiction of the courts is still subject to service upon its agents in actions accruing out of transactions outside the state. The most that can be said, then, is that at present the court is of opinion that service upon a state officer in actions accruing from extra-state transactions is not a reasonable method of service and hence unconstitutional.

The last blow to the theory of the necessity of consent seems to have been administered by *International Harvester Co.* v. *Kentucky*,[54] decided in 1913. In that case the corporation had been engaged in intrastate business within the state of Kentucky, and had designated an agent to receive service of process. The corporation discontinued its intrastate business and revoked the agency. It continued, however, to do an interstate business, and while so engaged was served in a criminal proceeding through one of its agents in the state, not the one originally designated. The court upheld the service on the sole and necessary ground that the corporation was present in the state. The corporation had never agreed to accept service on any but the designated agent, hence it was impossible to work out consent. Since this article went to press *International Harvester Co.* v. *Kentucky* has been followed by the New York Court of Appeals in *Tauza* v. *Susquehanna Coal Co.*[55] The opinion of the court, written by Judge Cardoza, furnishes an impressive buttress to the theory of jurisdiction by corporate presence.

The courts appear to adopt the view of Morawetz, who says:[56]

"There is not the slightest reason why service of process upon a foreign corporation, at common law, should not be governed by the same

[52] 236 U. S. 115 (1914). [53] 170 U. S. 100 (1897). [54] 234 U. S. 579.
[55] 220 N. Y. 259 (1917).
[56] PRIVATE CORPORATIONS, § 980.

principles and rules as service of process on domestic corporations, at common law."[57]

They seek first to assure themselves of jurisdiction by deciding the question of the corporation's presence. The most mooted difficulty is what constitutes "doing business within the state." This is merely a question of statutory construction, and is not necessarily as broad as the question of the corporation's presence.[58] Jurisdiction being found, the court then turns to the statute to settle the method of service.[59] A particularly striking illustration of this attitude is found in the decision and reasoning of the New York Court of Appeals in the case of *Dollar* v. *Canadian C. & F. Co.*[60]

A corporation may be said to be present in a state when any member of the corporate group is within the state's territorial limits on authorized business. The mere presence of any member of the group will not suffice to give jurisdiction of the corporation. It is necessary to sharply distinguish the personality of the individual from that of the group. The member's personality only merges in the group's when he is engaged in group activity. The group

[57] Mining Co. *v.* Johnson, 173 U. S. 221 (1898); Packing Co. *v.* Hunter, 8 Biss. 429 (1879) (Federal Court, Illinois); Groel *v.* United Electric Co., 69 N. J. Eq. 397, 60 Atl. 822 (1905); Colorado Iron Works *v.* Mining Co., 15 Colo. 499, 25 Pac. 325 (1890); Western Union Tel. Co. *v.* Pleasants, 46 Ala. 641 (1871); Equity Life Ass'n *v.* Gammon, 118 Ga. 236, 46 S. E. 100 (1903); Reeves *v.* Ry. Co., 121 Ga. 561, 49 S. E. 674 (1905); Railroad Co. *v.* Akers, 4 Kan. 453 (1868); Council Bluffs Canning Co. *v.* Omaha Mfg. Co., 49 Neb. 537 (1896); Railroad Co. *v.* Keep, 22 Ill. 9 (1859); Boyd *v.* Coates, 24 Ky. L. 730, 69 S. W. 1090 (1902); American Casualty Co. *v.* Lea, 56 Ark. 539, 20 S. W. 416 (1892).

[58] Colorado Iron Works *v.* Mining Co., 15 Colo. 499, 25 Pac. 325 (1890); International Text Book Co. *v.* Tane, 220 N. Y. 313 (1917).

[59] It is important to delimit the scope of jurisdiction obtained by consent, and that obtained by presence, in order to avoid decisions like Moulin *v.* Insurance Co., 24 N. J. L. 222 (1853), 25 N. J. L. 57, where the statute merely provided for a method of service. In that case, the court enforced a judgment obtained in New York upon service on an officer of a foreign corporation which had ceased to do business there. As soon as a corporation has withdrawn its representatives from the state, it is no longer present there, and jurisdiction must be obtained by consent. The statute may properly require consent to the jurisdiction of the courts as to disputes arising out of previous business to continue after the withdrawal of the corporation from the state. Mutual Reserve, etc. Ass'n *v.* Phelps, 190 U. S. 147 (1902). And that does not appear to be an unreasonable construction of any statute actually requiring the corporation's consent, or the designation of an agent to accept service. Groel *v.* United Electric Co., 69 N. J. Eq. 397, 60 Atl. 822 (1905). But the statute should actually require consent, and would be without effect unless consent was given.

[60] 220 N. Y. 270 (1917).

activity of a stockholder is generally limited to signing one proxy a year, and receiving an occasional dividend cheque. The foreign corporation would be present in the jurisdiction only during those processes which take an infinitesimal time, too fleeting to be caught. The corporate activity of the ordinary director consists solely of attending the meetings of the Board of Directors. The corporation will surely be wherever the board may meet, usually at the head office of the company. But when the director leaves the meeting his active connection with the corporation ceases for another month, and his presence or residence will not give a state jurisdiction of the corporation.[61] Of course, the corporation is present at any time isolated pieces of business are done within a jurisdiction by its agents properly authorized, but it is not present in the interim unless it maintains some representative or place of business there. But if the president of a foreign corporation lives in a state, or spends most of his time there, and is accustomed to supervise the corporate activities therefrom so far as is necessary, it would seem that that state had jurisdiction of the corporation although it had no office within the state and transacted no other business there.[62]

III

The court may get jurisdiction of individuals not domiciled in the territory, through allegiance, consent or presence. To dispose of the first, which is not of primary importance (an individual is a citizen of the state of his domicile) to American students, we may say that a sovereign or its court has jurisdiction to impose an obligation or judgment *in personam* upon a subject even though he is domiciled abroad.[63]

It is clear that a sovereign state can exclude citizens of other states from doing business within its territorial limits, and it is equally clear that it can admit them on the condition that they consent to the

[61] Riverside Mills *v.* Menefee, 237 U. S. 189 (1914).

[62] Grant *v.* Cananea Copper Co., 189 N. Y. 241, 82 N. E. 191 (1907). The presence of an officer or other employee of a foreign corporation, unless engaged on corporate business, will not give jurisdiction of the corporation. It is solely the corporate activity of the individual which links him with the group. Nor will the residence of an officer or employee be sufficient unless the state is the scene of a large part of his corporate activity, as in Grant *v.* Cananea Copper Co., *supra*. The employee or officer is then a continuously active and permanent part of the group whose presence gives jurisdiction.

[63] Douglas *v.* Forrest, 4 Bing. 686 (1828); Russell *v.* Cambefort, 23 Q. B. D. 526 (1889).

jurisdiction of the domestic courts, in suits brought within the state. It has, however, been suggested that the comity clause of the Constitution prevents the states of the United States from putting such a restriction upon the activities of citizens of the other states. Art. IV, sec. 2, cl. 1 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Amendment XIV provides in sec. 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The effect of the amendment is to enlarge the class of persons entitled to the benefits of the comity clause to include persons who, while citizens of the United States, are not citizens of states. Article IV of the Articles of Confederation, the predecessor and source of Article IV of the Constitution, reads as follows:

"The free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."

It indicates very clearly that the purpose and scope of the comity clause was to guard against discrimination by a state in favor of its own or against the citizens of other states. In the words of Mr. Justice Field in *Paul* v. *Virginia:* [64]

"It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States . . . it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws." [65]

[64] 8 Wall. (U. S.) 168, 180 (1868).

[65] The United States Supreme Court has never enumerated the privileges and immunities guaranteed by the Constitution, although in Blake *v.* McClung, 172 U. S. 239 (1898), it approved the partial enumeration made by Mr. Justice Washington in Corfield *v.* Coryell, 4 Wash. C. C. 371, 380 (1823). It may be observed that the comity clause applies only to civil or private rights, not to political, public, or rights given by the state in its proprietary capacity. 1 WILLOUGHBY, CONSTITUTION, 213 *et seq.* "The Privileges and Immunities of Citizens in the Several States," 1 MICH. L. REV. 286, 364.

It may, then, be fairly said that any state law which does not deny to citizens of other states substantial equality of private right will not violate the comity clause. A statute requiring residents of other states to consent to the jurisdiction of the state's courts in suits brought in these courts as a condition of doing business within the state does not necessarily affect that substantial equality. Since such a statute applies to citizens of the state residing abroad it might well be argued that the comity clause does not touch it at all. The only possible answer to this reasoning is that the number of citizens residing temporarily abroad and doing business in the state of their domicile is negligible, and hence the statute as a practical matter applies only to non-citizens.[66]

Citizens of a state doing business in its territory, whether through an agent or not, are liable to suit in, and subject to, its courts. To permit citizens of other states to do business within the state without being similarly amenable to process is to discriminate against domestic enterprise. A statute should not, however, attempt to extend the jurisdiction of the courts over non-citizens to a greater extent than that exercised over citizens. If, for example, a personal judgment may not be given against a citizen without personal service, a statute allowing such a judgment against a non-citizen will be unconstitutional.[67] But the fact that "personal service" has been used ambiguously to cover both service on the defendant in person and service by leaving the writ at his home, may explain a number of cases.[68] The statutes upon which service in these cases was based provided for service on a resident defendant in person, or if that be impossible, then by leaving the writ at his house, while they provided for service on a non-resident by leaving process with his agent.[69] The courts were thus immediately impressed by the ap-

[66] In this section of the article non-resident and non-citizen are used interchangeably.

[67] KENTUCKY CODE OF PRACTICE OF 1895, §§ 48, 56, 419; Moredock *v.* Kirby, 118 Fed. 180 (1902).

[68] 19 ENCYCL. OF PL. & PR. 613; ALDERSON, JUDICIAL WRITS AND PROCESS, 179; Johnston *v.* Robins, 3 Johns. (N. Y.) 440 (1808); Dunkle *v.* Elston, 71 Ind. 585 (1880); MINN. STAT. 1913, § 7732.

[69] MINN. STAT. 1913, § 7732, LAWS OF 1901, ch. 278; DELAWARE REV. CODE 1893, ch. 102, § 2, ch. 192; LOUISIANA-GARLANDS REV. CODE OF PRAC. 1914, § 187 *et seq.*; CODE OF TENN. 1896, § 4535 and cases and sections there cited, §§ 4516, 4542; Cabanne *v.* Graf, 87 Minn. 510, 92 N. W. 46 (1902); Caldwell *v.* Armour, 1 Pen. (Del.) 545, 43 Atl. 517 (1899); Aikmann *v.* Sanderson, 122 La. 265, 47 So. 600 (1908); Brooks *v.* Dun, 51 Fed. 138 (1892).

parent discrimination against non-citizens in making them subject to personal judgments under a substituted service while citizens were only subject to such judgments under personal service, using the term in the broader sense. The courts have found no difficulty in supporting service at the home of a non-citizen temporarily within the state,[70] for that is personal service in the broader sense to which citizens are subject.

The difference in the circumstances surrounding citizens and non-citizens makes a difference in the method of service upon the two necessary. No discrimination is involved if the difference in the means adopted to put all business enterprises operating in the state upon an equal footing bears a fair relation to the difference in the conditions attending each. Both citizens and non-citizens are subjected to the jurisdiction of the courts upon substituted service. It is natural to serve the citizen at his home, while in the great majority of cases such service would not be possible on non-citizens. The obvious place to serve process upon the latter is at his place of business. Apart from the possibility of discrimination the method of service is immaterial provided it be reasonably calculated to give the defendant notice of the controversy and afford him an opportunity to be heard in court. In *Pennoyer* v. *Neff*,[71] the leading case in this field of the law, the opinion of the court expressly recognizes the right of a state to impose this condition on non-citizens.[72]

But even were it admitted that such a statute did to some extent tend to infringe upon the guarantees of the comity clause, it might nevertheless be supported as a proper exercise of the police power. While the scope of the police power has never been exactly delimited, it is certain that "it extends to regulations designed to promote public convenience or the general prosperity." [73] It is also

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[70] Harrison *v.* Farrington, 35 N. J. Eq. 4 (1882); Davidson *v.* Hastings, 2 Keen 509 (1838).

[71] 95 U. S. 714 (1877).

[72] At page 735 Mr. Justice Field states: "Neither do we mean to assert that a State may not require a non-resident . . . to appoint an agent . . . to receive service of process and notice in legal proceedings [arising out of business done within the state] . . . As was said by the Court of Exchequer in Vallee *v.* Dumergue, 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed' . . ."

[73] Sligh *v.* Kirkwood, 237 U. S. 52, 59 (1914); Noble State Bank *v.* Haskell, 219 U. S. 104 (1910).

well recognized that the extent of several of the guarantees of the Federal Constitution is limited by the exercise of the police power of the states.[74] Nor is the comity clause an exception. Statutes forbidding the sale of liquor without a license which will be granted only to citizens, have time and again been upheld in the state courts and finally in the United States Supreme Court,[75] as proper police measures.[76]

If the purpose of the statute be within the scope of the police power, two further inquiries remain: (1) Does the statute bear a real relation to the accomplishment of that purpose? (2) Does it "operate alike upon all persons and property under the same circumstances and conditions"? With reference to the first inquiry it might well be argued that the statute should not be broader in terms than is reasonably required to secure the end sought and therefore that it should be restricted to cover suits brought by citizens of the state, or at any rate suits arising out of the business done within the state. Thus restricted it certainly makes for the security of commercial transactions within the state, and clearly coincides with the sentiment of the business public. Passing to the second inquiry, if a difference in treatment of groups is based upon and bears a relation to a substantial difference in the conditions surrounding each, then it does not violate the Fourteenth Amendment.[77] There is obviously a real difference in the accessibility of citizens and non-citizens in courts of justice. Statutes such as those in question, which merely provide a different and more appropriate method of substituted service on non-residents than that used for residents would seem to be constitutional beyond any question, although this point has not been discussed in any of the cases. Numerous similar statutes, many of them on all fours with those under discussion, have been sustained on this theory.[78]

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[74] COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 832.

[75] Welsh *v.* State, 126 Ind. 71, 25 N. E. 883 (1890); Mette *v.* McGuckin, 18 Neb. 223, 25 N. W. 338 (1885), 149 U. S. 781 (1892).

[76] See collection of authorities in 14 L. R. A. 582, particularly Haney *v.* Marshall, 9 Md. 194 (1856), and kindred cases; see the physician cases in 1 MICH. L. REV. 286, cited *supra*.

[77] Barbier *v.* Connelly, 113 U. S. 27, 31–32 (1884).

[78] Nearly every state in the Union has statutes regulating non-resident persons and associations, whether incorporated or not, engaging in the business of insurance within its limits. These statutes invariably require the appointment of an agent within the state to receive service of process as a condition of the right to do business. Not

It is now settled that a statute requiring foreign corporations engaged in interstate commerce to submit to the jurisdiction of the state courts disputes arising out of interstate business transacted within the state is justified as an exercise of the police power before action by Congress.[79] The numerous quarantine and other regulations previously supported on the same ground made this an almost necessary result. By a parity of reasoning a similar statute covering individuals engaged in interstate commerce should be supported.[80] As it will hardly be contended that the right of citizens to do business within a state is of a more sacred nature than that of a corporation engaged in interstate commerce, these cases have a very close bearing on our main problem.[81]

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merely have none of these statutes been upset because of this provision, but they have always been expressly upheld except where the statutes were obviously calculated in other respects to put non-residents at a disadvantage, and the discrimination had no basis in a difference of position between residents and non-residents adequate to justify it. People *v.* Gay, 107 Mich. 422, 65 N. W. 292 (1895); State *v.* Stone, 118 Mo. 388, 24 S. W. 164 (1893); but see State *v.* Ins. Commrs., 37 Fla. 564, 20 So. 772 (1896); Barnes *v.* People, 168 Ill. 425, 48 N. E. 91 (1897); 25 L. R. A. 238 for statutes upset because clearly discriminatory. Many statutes making it more difficult for non-citizens to obtain relief in domestic courts have been sustained, because the difference in position between citizens and non-citizens required different provision to protect all parties to litigation. The presence of the citizen and his property within the jurisdiction affords a surety lacking in the case of non-citizens. In Haney *v.* Marshall, 9 Md. 194 (1856), the statute required security for costs from non-residents. In Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911 (1887), the statute dispensed with an undertaking in attachment proceedings where defendants were non-residents. Campbell *v.* Morris, 3 Harr. & McH. (Md.) 535 (1797), was another case making a different provision for non-residents with respect to attachments. See also the liquor license and physician cases cited *supra*, notes 75, 76; also see 14 L. R. A. 582.

[79] International Harvester Co. *v.* Kentucky, 234 U. S. 579 (1913); Western Union Tel. Co. *v.* Pleasants, 46 Ala. 641 (1871); Tauza *v.* Susquehanna Coal Co., 220 N. Y. 259 (1917).

[80] Adams Express Co. *v.* Crenshaw, 78 Ky. 136 (1879).

[81] It seems settled on authority that the problem of getting jurisdiction by consent over non-incorporated associations of citizens of other states is not different from that of getting jurisdiction similarly over individual citizens of other states. As *res integra* one might have quarreled with the decision in Paul *v.* Virginia, 8 Wall. (U. S.) 168, dividing all extra-state enterprises into corporations not entitled to the benefit of the comity clause and citizens who are. It might have been argued that the corporate group was simply a convenient form of organization employed by citizens in commercial undertakings and equally entitled with citizens to the protection of the comity clause. If, however, the distinction had to be drawn between citizens and group units which are not citizens, the point might have been made that all groups must be withdrawn from the scope of the comity clause, because each unit has an identity although not a legal personality distinct from its members, the citizens.

As a matter of fact, most of the statutes attempting to extend the jurisdiction of the courts over non-citizens doing business within the territory show not the slightest intention on the part of the state to bargain or to admit the group or individual to do business on the condition that it or he consent to the jurisdiction of the courts. Those statutes which disclose such a state of mind very sensibly forbid the parties to do business until they have filed with a state officer a designation of an agent to accept service. The insurance statutes are all of this type; as also is the Kentucky provision for service on non-residents engaging in the surety business within the state.[82]

Most of the statutes seem to assume the existence of jurisdiction over the parties and merely provide a method of service. Generally the courts, which have held this type of statute unconstitutional, have made the validity of this assumption, or rather its invalidity, one of their two principal *rationes decidendi.* The other has been the alleged infringement of the rights secured to citizens of other states by the comity clause previously discussed. We must now proceed to investigate the validity of the assumption made by the statutes, that is, to what extent, if any, jurisdiction through presence may be obtained over non-resident individuals and groups.

The problem of obtaining jurisdiction by presence calls for the application of several principles already laid down. A restatement of the problem will probably aid in its solution. Where an individual is not (1) present within the state, or (2) domiciled there, (3) owes it no allegiance, and (4) has not consented to its jurisdiction, the state's courts have no power to render a personal judgment against him since *Pennoyer* v. *Neff.*[83] In the case under discussion, while the individual is not personally present in the state, he is doing business there either as an individual entrepreneur or as a member of a group of entrepreneurs, through agents who represent him. The latter case, while giving rise to the more numerous and vital problems in the modern state, theoretically affords us less difficulty than the former. Today we have great aggregations of capital doing a business which recognizes no territorial limits, with every conceivable form of organization; partnership, limited partnership, joint stock company, and trust, possessing vast powers for

[82] KENTUCKY STATUTES, 1915 (Carroll), § 3720 *d.*

[83] 95 U. S. 714 (1877).

good and evil. But more important perhaps are the immense combinations of men with power to shake the very foundations of the state, such as our labor unions, political groups, and religious organizations, not to mention the mushroom-like growth of coöperative and fraternal societies of all characters. Some of these in the United States and England, but more particularly on the Continent, have, by judicial decision and statute, been given many of the attributes of a corporation. Whether the effect of such laws has been to confer personality on any group or not, is a question to be determined by the laws of any place in which the group may happen to be present. Whether the jurisdiction which creates a status calls it by that name is immaterial.[84] We are not directly interested in the domestic status and regulation of these groups.[85] Our problem is the control the courts of a state may exercise over one of them, formed under the laws of another sovereign, which do not recognize its corporate personality, when it engages in activities within the territories of the state. We shall not stop to consider the jurisdiction of courts of law or equity over such members of the group as are within the jurisdiction. It is obvious that the courts have no jurisdiction over the non-resident members of these groups except such as they can exercise through the group.

If group A, an unincorporated union, is running a strike, or group B, an unchartered farmers' coöperative society, is disposing of its members' eggs within a state, either group is very clearly present and doing business within that state. If a negro slave domiciled in a state which denied him personality,[86] came north and did some business while present within a northern state, there would in common law countries be no question as to the right of that state to predicate personality upon him, that is, the capacity for rights and obligations.[87] Personality is not a status in the common law. There

[84] United States *v.* Adams Express Co., 229 U. S. 381 (1912); Edgeworth *v.* Wood, 58 N. J. L. 463, 33 Atl. 940 (1896); Pipe Co. *v.* State Board, 57 N. J. L. 516, 31 Atl. 220 (1895); Express Co. *v.* State, 55 Ohio St. 69 (1896).

[85] For the nature of the difficulties involved in these problems reference should be made to 3 MAITLAND, COLLECTED PAPERS, 271 *et seq.* Geldart's brilliant paper on Legal Personality, 27 L. QUART. REV. 90, Jethro Brown's discussion of the Personality of the Corporation and State, 21 L. QUART. REV. 365, the articles of Dicey and Geldart already cited, note 7, in English, and the vast continental literature on this subject.

[86] STROUD, SLAVE LAWS, 2 ed., 34 *et seq.*; State *v.* Mann, 2 Devereux Law (N. C.) 263 (1829); *Ex parte* Boylston, 2 Strobhart Law (S. C.) 41, 43 (1846).

[87] Somerset *v.* Stewart, Lofft 1 (1772); Polydore *v.* Prince, 1 Ware *402 (1837).

seems, therefore, to be no reason why the laws of a state should not predicate personality upon any foreign group, capable of a capacity for rights and obligations, at any rate to the extent of the business done within the state. The United States Supreme Court has expressly held that Congress might do this.[88] The courts of the state would then have the power to render a judgment *in personam* against the group as such, and, what might be more important, make a decree in equity binding it.

It seems that this is exactly what has been done by states that have passed statutes similar to the Texan one sustained in *Sugg* v. *Thornton*.[89] Texas Statutes, section 1224, provide:

"In suits against partners the citation may be served upon one of the firm and such service shall be sufficient to authorize a judgment against the firm and against the partner actually served."

Section 1346 provides:

"Where the suit is against several parties jointly indebted upon a contract and the citation has been served upon some of the parties, but not upon all, judgment may be rendered therein against such partnership and against the partners actually served, but no personal judgment or execution shall be awarded against those not served."

The effect of this statute is to impose an obligation on the partnership as such, enforceable only against the property of the partnership, which is to that extent treated as a legal person. In *Sugg* v. *Thornton* [90] the United States Supreme Court sustained a personal judgment against a firm, one of the partners of which resided in another state, although service was made only upon the resident partner. Texas not having jurisdiction of the non-resident partner could not charge his share of the partnership assets by a personal judgment. But Texas had the right to treat a partnership present in Texas as a legal person as well as a commercial unit and as such to impose a personal judgment upon it enforceable against all its property no matter to whom that property might go in the event of a distribution of the firm's assets. In other words, such statutes cannot be supported as mere procedural conveniences when applied to partnerships all the members of which are not within the

[88] United States *v.* Adams Express Co., 229 U. S. 381, 390 (1912).
[89] 132 U. S. 524 (1889).
[90] *Ibid.*

jurisdiction of the court.[91] *Sugg* v. *Thornton* and the long line of similar decisions hold that a state may personify a foreign partnership for the purpose of jurisdiction. Such statutes are to be found in nearly every jurisdiction in the United States, and judgments against foreign partnerships based upon the service they prescribe have been universally upheld.[92] Some similar statutes have been held unconstitutional, and properly so, when they have made no provision for limiting the enforceability of the judgment to the property of the firm and of those partners personally served.[93] The English rules of the Supreme Court[94] similarly provide for suits against the partnership as such when the firm is doing business in England. The judgment binds only the firm assets and the assets of any partner who may be served within the jurisdiction.[95]

Most of these statutes make service on the agent in charge of the local business enough to support a judgment against the firm, and this is clearly sound if the partnership is present and doing business in the jurisdiction. The presence of one partner cannot give the courts any peculiar right to charge the share of non-resident partners in the partnership assets; that power can exist only by virtue of the presence of the firm, and the presence of a partner is no more the presence of the firm than the presence of any other agent in the scope of his employment. Indeed, it would seem less so where an immense business is carried on in a partnership form and where the holder of a certificate for a 1/1000 distributive interest is a partner. The presence of such a partner taking no active part in the business

[91] If all the members are within the court's jurisdiction it may be said that reasonable notice of the controversy is all that is required by due process.

[92] Sugg *v.* Thornton, 132 U. S. 524 (1889); Winter *v.* Means, 25 Neb. 241, 41 N. W. 157 (1888); Broatch *v.* Moore, 44 Neb. 640, 63 N. W. 30 (1895) (only enforceable against firm property); Brawley *v.* Mitchell, 92 Wis. 671, 66 N. W. 799 (1896); Sketchley *v.* Smith, 78 Ia. 542, 43 N. W. 524 (1889); Roberts *v.* Pawley, 50 S. C. 491, 27 S. E. 913 (1897) (S. C. Stat. not complied with); Yerkes *v.* McFadden, 141 N. Y. 136, 36 N. E. 7 (1894); Whitmore *v.* Shiverick, 3 Nevada, 288 (1867); Johnson *v.* Lough, 22 Minn. 203 (1875); Brooks *v.* McIntyre, 4 Mich. 316 (1856); Ralya Market Co. *v.* Armour, 102 Fed. 530 (1900); Thomas *v.* Nathan, 65 Fla. 386, 62 So. 206 (1913); Kearney *v.* Fenner, 14 La. Ann. 870 (1859).

[93] Flexner *v.* Farson, 268 Ill. 435, 109 N. E. 327 (1915); Caldwell *v.* Armour, 1 Pen. (Del.) 545, 43 Atl. 517 (1899); Brooks *v.* Dun, 51 Fed. 138 (1892); Aikmann *v.* Sanderson, 122 La. 265, 47 So. 600 (1908), all partnership cases.

[94] Order 48; A, sec. 1, 8.

[95] Banking Co. *v.* Firbank, [1894] 1 Q. B. 784, but see PIGGOTT, SERVICE OUT OF THE JURISDICTION, 81 *et seq.*, for previous state of the law and difficulties raised before this conception was accepted.

of the group would, it seems, have no more the effect of giving the court jurisdiction than the presence of a stockholder in a corporation, provided the corporation were not otherwise engaged in business in the jurisdiction.[96]

Where the group is of such character it has all the advantages of a corporation together with the protection of the comity clause. If it could insist on having all its members joined as necessary parties defendant as a condition of suit, it would obtain practical immunity from personal obligation. This difficulty has likewise been met by statutes which in effect make such companies legal persons. A typical statute is to be found in the New Jersey Practice Act, section 40 of which provides as follows:

"Any unincorporated organization, consisting of seven or more persons and having a recognized name, may be sued by such name in any action affecting the common property, rights and liabilities of such organization; all process, pleadings and other papers in such action may be served on the president . . . or the agent or manager or person in charge of the business of such organization; such action shall have the same force and effect as regards the common property, rights and liabilities of such organization as if it were prosecuted against all the members thereof; and such action shall not abate by reason of the death, resignation, removal or legal incapacity of any officer of such organization or by reason of any change in the membership thereof."

The sections following treat the group in all respects as a corporation. Service under this statute was made the basis of a personal judgment against a Lloyds Association for insurance in *Bank* v. *Fire Association*.[97] Such judgments have been invariably sustained,[98] even where the group has been organized outside the state and is composed principally of non-residents.[99] New York has gone to

[96] It should be remembered that service on an agent is not upheld because he is an agent of the partners. That reasoning would be equally applicable to support a personal judgment against each partner, and, *a fortiori*, to support a personal judgment against each and all of the partners where only one has been served. The court having jurisdiction of the agent of the partnership group has thereby jurisdiction of the group through its presence, and the service is upheld as service on the group.

[97] 63 N. J. L. 5 (1899).

[98] Bank *v.* Van Derwerker, 74 N. Y. 234 (1878); BLISS, ANNOTATED NEW YORK CODE, § 1919 *et seq.*, and cases cited; Patch Mfg. Co. *v.* Capeless, 79 Vt. 1, 63 Atl. 938 (1906) (VT. STAT., § 1099); Appeal of Baylor, 77 S. E. 59 (S. C. 1913).

[99] State *v.* Adams Express Co., 66 Minn. 271, 68 N. W. 1085 (1896); Taylor *v.* Order of Railway Conductors, 89 Minn. 222, 94 N. W. 684 (1903); Adams Express Co. *v.*

the extent of treating a joint stock company, which it declares not to be a corporation and which has non-resident members, as having personality sufficiently distinct in law to allow one of its members to sue it for a wrong arising out of its dealings with him as a common carrier.[100] The United States Supreme Court has held that the Interstate Commerce Act has personified the joint stock companies engaged in the express business to the extent of making them indictable.[101]

The form in which the group's business is carried on should not affect the question of jurisdiction. The sole question should be: Is the group present? It is conceived that it is not present unless it maintains agents or members engaged in the group business within the state. If the group is actually doing business there, whether the profit sharers are partners, or *cestuis que trustents*,[102] or mere shareholders,[103] should be immaterial. There is certain property being used in the business and judgment can always be enforced against that — the judgment itself can run against the group in its business name. If a hedge of trustees holds legal title to the assets of the business, the equitable title is at any rate in the group and its members, and may be levied upon in a judgment against the group. A trust estate is not less capable of personality than other groups; it possesses personality on the continent. Indeed, all these groups receive more or less recognition as persons, principally in taxing statutes.[104]

As a matter of fact, the external group activities of the house of J. P. Morgan, of which J. P. Morgan is the sole proprietor, are not distinguishable from those of the firm of J. P. Morgan & Co., of which J. P. Morgan and H. P. Davison are partners, or from those of J. P. Morgan, Inc., of which J. P. Morgan owns all the shares except those allotted to dummy directors. If J. P. Morgan & Co. and J. P. Morgan, Inc., can as matter of fact be said to be present in a foreign jurisdiction, then the house of J. P. Morgan may simi-

Schofield, 23 Ky. L. 1120, 64 S. W. 903 (1901); Messler *v.* Schwarzkopf, 35 N. Y. Misc. 72 (1901).

[100] Westcott *v.* Fargo, 61 N. Y. 542 (1875).

[101] United States *v.* Adams Express Co., 229 U. S. 381, 390 (1912).

[102] Williams *v.* Milton, 215 Mass. 1 (1913).

[103] *In re* Associated Trust, 222 Fed. 1012 (1914).

[104] Federal Corporation Income Tax.

larly be there. But if a state in which the house of J. P. Morgan is doing business decides to endow it with legal personality, it may certainly do so. If judgment be given against the new entity, against what property may it be enforced? Evidently it is enforceable against the property within the jurisdiction actually engaged in the business, such as office furniture, cash in hand, and securities employed as collateral. But can the plaintiff go further and attach the property of J. P. Morgan not actually being used in the business at the present moment? It is thought that he may. Where an individual engages in business, his relation to that business is different from his relation to a partnership of which he is a member, or to a corporation in which he invests. In each of the latter two cases a definite sum is generally laid aside as capital with which to carry on the business. This sum may not be reduced without considerable formality. In the case of the individual, except occasionally as a matter of bookkeeping and then without further significance, no distinction is made between property to be used in the carrying on of his business and that to be used for his other activities. He puts money into the business and takes it out as circumstances demand. Thus, in a sense, it may be said that all the property owned by J. P. Morgan personally is, as a matter of fact, as it is as a matter of law, the capital of the house of J. P. Morgan. In other words, the whole property of the individual in this case is the property of the group entity known as the house of J. P. Morgan and it is subject to execution on a judgment against that entity. When a man is carrying on several enterprises which he is really desirous of isolating, he incorporates them. Unless he does so, it may be said that they constitute a unit only separated so far as convenience demands, the capital and labor of each flowing into the other whenever desirable. A law subjecting the whole of an individual's property to execution under a judgment against his business should not be held unconstitutional. The capital of his business is admittedly subject to execution under such a judgment, and the test laid down for determining that capital cannot be said to be an unfair or unreasonable one, because in the great majority of cases the individual's property is the capital of his business, and in those few cases in which this might not be true, it would as a practical matter be impossible to distinguish the individual's property from the capital of his business. Allowing the judgment to be taken against the

individual directly, is merely a matter of procedure and cannot affect the substantial rights of the parties. *Pennoyer* v. *Neff*[105] has not concluded this reasoning, because the statute in that case was not restricted to individuals engaged in business within the state. Indeed, as we have seen, the opinion of the court specially excepted such a case from its decision.

The courts have not yet expressly formulated this theory, although it has been the basis of several decisions. For a time it appeared to be the theory adopted by the British judges in drawing up their rules under the Judicature Act of 1873. Rules of the Supreme Court, Order IX provides:

"When one person carrying on business in the name of a firm apparently consisting of more than one person shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there, and subject to any of the rules of the Supreme Court, such service shall be deemed good service on the person sued."

Order XVI provides (section 8):

"Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm."

In *O'Neil* v. *Clason*[106] the Divisional Court upheld service on the manager of the business of a resident of Germany not then within the jurisdiction, doing business under the name of Clason & Co. Since the court had no jurisdiction over the non-resident, this decision interpreted the rules as recognizing the personality of a man's business apart from himself. Unfortunately, some seventeen years later the case was overruled by the Court of Appeal in *St. Gobain* v. *Hoyermann*,[107] where the rules were interpreted to cover only a resident doing business under a firm name. But as Dicey points out, the question is not yet free from doubt in England.

In *Alaska Commercial Co.* v. *Debney*,[108] the United States Circuit Court of Appeals for the Ninth Circuit committed itself to the same theory, by enforcing a judgment obtained in Canada against a defendant residing in the United States upon service on the agent in

[105] 95 U. S. 714 (1877).
[106] 46 L. J. Q. B. (N. S.) 191 (1876).
[107] [1893] 2 Q. B. 96.
[108] 144 Fed. 1 (1906).

charge of his business in Canada, without in any way raising the question of defendant's consent to the service. As the Canadian court did not have jurisdiction of the defendant but only of his business, the decision recognizes the possibility of the business constituting a legal personality distinct from its owner.

Guenther v. *American Steel Hoop Co.*[109] is probably the leading American case. The facts are the same as those in the English case, but the statute is in the ordinary American form. It is as follows:[110]

"In actions against an individual residing in another State or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

The court, in the most carefully reasoned opinion on the subject, proceeding from the *dictum* of Mr. Justice Field in *Pennoyer* v. *Neff*,[111] seems to feel that the question of discrimination under the comity clause is the only one involved. But it recognizes that the judgment given in Kentucky does not necessarily have to be given full faith and credit abroad in such states as do not possess statutes similar to the Kentucky one. Such states have not recognized a legal personality similar to that created by the Kentucky statutes, and hence there is no defendant amenable to their courts against whom the judgment might be enforced. The court in *Johnson* v. *Westerfield* [112] dealt with an individual engaged in interstate commerce in the same way, and correctly so. The fact that the individual is engaged in interstate commerce cannot affect the question before Congress has taken action. In Indiana we have a decision of the highest court in *Edwards* v. *Van Cleave*,[113] supporting a judgment rendered against a non-resident individual doing business within the state based on service upon his agent in charge. *Green* v. *Snyder* [114] and *Carpenter* v. *Laswell* [115] are exactly in point.[116]

[109] 116 Ky. 580, 76 S. W. 419 (1903).
[110] Ky. Civil Code, sec. 51, subsec. 6.
[111] Cited *supra*.
[112] 143 Ky. 10, 135 S. W. 425 (1911).
[113] 47 Ind. App. 347, 94 N. E. 596.
[114] 114 Tenn. 100, 84 S. W. 808 (1905).
[115] 23 Ky. L. 686, 63 S. W. 609 (1901).
[116] Adams Express Co. *v.* Crenshaw, 78 Ky. 136 (1879); Crane *v.* Hall, 165 Ky. 827, 178 S. W. 1096 (1915); Rauber *v.* Whitney, 125 Ind. 216, 25 N. E. 186 (1890); Behn *v.* Whitney, 125 Ind. 599, 25 N. E. 187 (1890), are all cases containing *dicta* supporting the principal cases, but being partnership cases are not in point. Probably they are wrongly decided where the judgment is not limited to firm assets.

The only decision squarely holding a statute of this type unconstitutional when applied to non-resident individuals is *Cabanne* v. *Graf*[117] decided by the Supreme Court of Minnesota in 1902. The court very properly pointed out that the defendant in that case had never consented to submit himself to the jurisdiction of the Minnesota courts. But it then went on to beg the question by assuming that *Pennoyer* v. *Neff*[118] had concluded it when that case settled that a personal judgment could not be given against a person over whom the court had no jurisdiction. There are, however, several cases not themselves in point containing *dicta*, founded principally on the comity clause, denying the constitutionality of similar statutes.[119]

So far we have been discussing the right of a state to give a personal judgment against a group or individual residing abroad. If this right is conceded we can secure a judgment enforceable not merely against property now within the state but against any property subsequently brought in, thus making it practically impossible to do business within the state until the judgment is satisfied. As a remedy for the plaintiff, this is immensely superior to leaving him to bring separate *quasi-in rem* actions against each piece of property brought in. How far the judgment would be enforceable in a state other than that in which it was rendered would depend on the law of that state. If the state in which it was sought to enforce the judgment recognized the personality of the group or entity against which the judgment had been rendered, the judgment would come within the guaranty of the full faith and credit clause. If the state recognized no such personality, of course it would be justified in refusing to enforce a judgment running against someone who could not be brought before its courts.[120]

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[117] 87 Minn. 510, 92 N. W. 46 (1902).

[118] 95 U. S. 714 (1877).

[119] Caldwell *v.* Armour, 1 Pen. (Del.) 545, 43 Atl. 517 (1899); Brooks *v.* Dun, 51 Fed. 138 (1892); Aikmann *v.* Sanderson, 122 La. 265, 47 So. 600 (1908); Flexner *v.* Parson, 268 Ill. 435, 109 N. E. 327 (1915), are all partnership cases in which judgment was not restricted to partnership assets and hence properly set aside. In Moredock *v.* Kirby, 118 Fed. 180 (1902), the state code did not allow judgments against citizens except on personal service. See note 67, *supra*.

[120] Flexner *v.* Parson, 268 Ill. 435, 109 N. E. 327 (1915).